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JUN 11 1942
CHARLES ELMORE CROPL

Supreme Court of the United States

OCTOBER TERM, 1941

No. 143-144

F. M. MADDIX, MALINDA MADDIX,
W. F. SAULSBERRY and
GEORGE A. SAULSBERRY, - - *Petitioners,*

vs.

E. L. SAULSBERRY, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Summary of Matters Involved.

This case involves a decision of the Circuit Court of Appeals for the Sixth Circuit affecting the title to certain Kentucky land and minerals which is in conflict with the settled laws of Kentucky relating to real estate, and to review which petitioners pray a writ of certiorari.

The action was brought by respondent, E. L. Saulsberry, in the District Court for the Eastern District of Kentucky, against the petitioners. It was alleged

that petitioners were trespassing on and removing certain fire clay claimed by respondent. The case was submitted to the District Court on stipulations and motions by the parties for summary judgment. The District Court adjudged that respondent was the owner of an undivided five-sixths interest in the fire clay under the land in controversy, but further adjudged that a deed which he obtained to the remaining one-sixth interest after he had commenced the action in the District Court was champertous and void. Respondent appealed to the Circuit Court of Appeals for the Sixth Circuit from so much of the judgment as cancelled the deed mentioned, and the petitioners took a cross-appeal from the part of the judgment adjudging the respondent the owner of five-sixths interest in the minerals.

The original and cross-appeals were heard and argued together in the Circuit Court of Appeals, and decided by that court on February 4, 1942, adversely to petitioners on both the original and cross-appeals. Petitioners filed petition for rehearing on March 2nd, which petition for rehearing was overruled on March 11, 1942, and the judgment of the Circuit Court of Appeals became final on that date.

By agreement of the parties the cross-appeal was prosecuted, heard and decided in the Circuit Court of Appeals upon the record prepared on the original appeal. One opinion was handed down on both appeals. In preparing the transcript of record for this petition, the Clerk of the Circuit Court of Appeals has prepared the record and proceedings on the original and cross-appeals in separate transcripts, and references will be made to same in this petition as "record on original appeal" and "record on cross-appeal".

The facts are not in dispute and were agreed upon in the Circuit Court of Appeals. They are:

In 1908, E. L. Saulsberry, respondent, joined by A. D. Saulsberry and their wives, executed a deed to petitioner, F. M. Maddix, and his brothers E. T. and Wess Maddix, whereby respondent purported to convey to petitioner and his brothers two tracts of land, one containing 154 acres and known in this case as the "Huntsman Dower Tract" and the other containing 48 acres and known as the "West End Tract". (Rec. original appeal pp. 19-23). At the time this deed was made E. L. Saulsberry was the actual owner of the "West End Tract". (Rec. cross-appeal pp. 1, 2). He owned, however, only a fractional undivided interest in the "Huntsman Dower Tract" (Rec. original appeal pp. 28, 29). In this deed there was inserted a "reservation" purporting to reserve all the fire clay, which reservation has been construed by the Circuit Court of Appeals to have related to both the "West End Tract" and the "Huntsman Dower Tract". (Rec. original appeal pp. 42-45 and Rec. cross-appeal pp. 12-15).

Petitioners never questioned the fact that this reservation applied to the "West End Tract", but did contend that it had no application to the "Huntsman Dower Tract", and that, if it did apply to the "Huntsman Dower Tract", it could not operate to except or reserve all the minerals thereunder for the reason that respondent did not own all these minerals, but only owned a fractional interest in the same at the time the deed was made.

Respondent owned only a five-twelfts remainder interest in the "Huntsman Dower Tract", and his cograntor, A. D. Saulsberry, owned only a two-twelfths

interest, at the time they made the deed of 1908 to petitioner, F. M. Maddix, and petitioner's co-grantees. The co-grantees conveyed their interest to said petitioner and he immediately went into possession of the land, claiming it as his own, and has so remained in possession of the land since 1908. (Rec. original appeal, pp. 28, 29). In 1938, F. M. Maddix leased a portion of the minerals under the land to petitioner W. F. Saulsberry, who in turn leased to petitioner, Geo. A. Saulsberry, and mining operations in the fire clay were commenced. (Rec. original appeal, pp. 8-12). This suit was commenced to restrain those mining operations.

After he had commenced his action, respondent obtained a deed from Mary Huntsman Griffith, the widow of the original owner of the land, purporting to convey her life interest and a one-sixth interest she had inherited from a deceased son.

It is the contention of petitioners that, under the law of Kentucky, respondent and his co-grantor, being together the owners of only a seven-twelfths interest in the land, could not "reserve" or "except" more than a seven-twelfths interest in the minerals in said land by their deed of 1908; that, therefore, no severance of the other five-twelfths interest in the minerals was ever effected and that petitioner, F. M. Maddix, acquired title to this outstanding five-twelfths interest in the minerals, as well as the surface, by his adverse possession of 30 years.

And it is further the contention of petitioners that, under the law of Kentucky, the deed obtained by respondent from Mary Huntsman Griffith after he had commenced this action, and while the minerals were being operated by petitioners, was champertous and void.

The Circuit Court of Appeals, in conflict with the settled law of Kentucky, has held that:

1. Although respondent and his co-grantor owned only a seven-twelfths interest in the property when they made the deed of 1908 to petitioner, Maddix, the "reservation" of "all the fire clay" operated to sever all the fire clay in the land from the surface, and although petitioner Maddix obtained title to the outstanding interests in the surface by adverse possession, he did not obtain title to the outstanding interests in the minerals by reason of such alleged severance.

2. The deed of 1938, obtained by respondent after he had commenced his action and after "appellee's entry and removal of the minerals" was held not to be champertous.

Jurisdiction.

It was the duty of the Circuit Court of Appeals to decide the title to the land and minerals involved in accordance with the rules of law established by the decisions of the Court of Appeals of Kentucky and the Statutes of Kentucky. Erie R. Co. v. Tompkins, 304 U. S. 64. Failure so to do is a proper subject of review by this court on petition for writ of certiorari. Cities Service Oil Co. v. Dunlap, et al, 308 U. S. 208. It is, therefore, upon the ground that the lower court has declined to decide this case in accordance with the rules established by the decisions of the Court of Appeals of Kentucky, and the Statutes of Kentucky, that the jurisdiction of this court is invoked.

The Questions Presented.

This case presents the following questions:

1. Could the lower court decline to follow the rule

of law established in Kentucky by the decision of the Kentucky Court of Appeals in the case of Rowland, et al v. Lilly's Heirs, 190 Ky. 757, which decision was that a person who owns only a fractional interest in land can not "reserve" or "except" all the minerals in the land, but can only except such interest in the minerals as he actually owns?

2. Could the lower court decline to follow the rule established by the decision of the Court of Appeals of Kentucky in the cases of Big Sandy Co. v. Ramey, 162 Ky. 236, and J. B. Gathright Land Co. v. Begley, 200 Ky. 808, which cases held that where there has been an ineffectual attempt to sever minerals from surface, or where only a part of the minerals have been severed from the surface, adverse possession of the surface extends to the unsevered minerals and ripens into good title to both surface and minerals?

3. Could the lower court decline to follow Kentucky Statutes, Section 210, providing that sales of lands in the adverse possession of another are void as particularly construed by the Court of Appeals of Kentucky in Big Sandy Co. v. Ramey, supra?

4. Has the lower court declined to follow the decision of this court in Orton v. Smith, 18 Howard 263, which opinion held, as a matter of common law, and independent of any champerty statute, that the purchase by a litigant of real estate, while a suit involving the title to it is pending, is litigious and void?

Reasons for Allowing the Writ.

The Court of Appeals of Kentucky has specifically decided the law involved in all of the first three questions presented. The law involved in the first question

has been fully and clearly decided in the case of Rowland v. Lilly's Heirs, 190 Ky. 757. In that case Mrs. Lilly and James West were the joint owners of two tracts of land. Mrs. Lilly conveyed her undivided one-half interest in the land to West, but, in the deed, inserted a reservation or exception by which it was purported to reserve all the minerals. West conveyed the lands to Williams and others with the same reservation in favor of Mrs. Lilly inserted in the deed. In an action between the heirs of Mrs. Lilly and the vendees of Williams, it was held by the Kentucky Court that since Mrs. Lilly never owned more than an undivided one-half interest in the land, she was powerless to reserve or except more than an undivided one-half interest in the minerals, and that the vendees of Williams were the owners of the one-half interest originally owned by West in the minerals. The decision in that case clearly applies to the case at bar. It is the law of Kentucky, and the lower court failed to follow this law of Kentucky when it held that the reservation in the deed of 1908 from respondent and his co-grantor, who together, owned only a seven-twelfths interest in the land in question, operated to except and sever all the minerals in the land.

The law involved in the second question presented has also been clearly settled by the decisions of the Kentucky Court. Where, as here, there has been an ineffectual attempt to reserve or sever minerals from the surface, or where only a part of the minerals have been reserved or severed, adverse possession of the surface extends to the part of the minerals which have not been severed and ripens into good title to both surface and unsevered minerals. This rule was clearly established in the cases of J. B. Gathright Land Co. v. Begley, 200 Ky. 808, and Big Sandy Co. v. Ramey, 162 Ky. 236.

In the former case an ineffectual attempt of a married woman to convey her minerals and reserve the surface of her land was held not to sever the minerals from the surface. In the latter case it was held that where only a portion of the minerals had been severed from the surface, adverse possession of the surface of land extended to that portion of the minerals which had not been severed and would ripen into good title to both surface and minerals.

The law involved in the third question presented is plainly fixed by Section 210, Ky. Statutes, which provides that any sale of land in the adverse possession of another is void. And it was held in Big Sandy Co. v. Ramey, supra, that a person in possession of the surface of land from which a part of the minerals have not been severed, is likewise in adverse possession of the unsevered portion of the minerals, and that a conveyance of that unsevered portion of the minerals, during such adverse possession, is void.

As to the fourth question presented, it is agreed that this action was brought by respondent to restrain petitioners from mining the minerals in question, and that after the action was brought, and while it was pending, respondent obtained a deed from Mary Huntsman Griffith purporting to convey to him her interest in the land which was in dispute. This was clearly a purchase of a litigious claim by a litigant while his suit was pending, and was therefore champertous and void according to the decision of this court in Orton v. Smith, 18 Howard 263. There is no Kentucky decision opposed to this rule.

BRIEF.

The lower court, in its opinion, recognized that respondent and his co-grantor together owned only

a seven-twelfths interest in the "Huntsman Dower Tract" at the time of their conveyance to petitioner, Maddix. But it holds that, nevertheless, a severance of all the minerals was effected by the "reservation" contained in the deed. The court further recognized that Maddix, by his adverse possession of the land for 30 years, obtained title to the outstanding interests in the surface, but held that, by reason of the supposed severance, he did not obtain title to the corresponding outstanding interests in the minerals. (Rec., original appeal, 40, 41, 42).

Hence, the decisive question, sharply presented, is: Under Kentucky law, did the "reservation" in the deed operate to effect a complete severance of all the minerals? If it did, then the lower court was correct in its ultimate decision on this point. If it did not, then according to the lower court itself, petitioner Maddix obtained title by adverse possession to the outstanding interests in the minerals as well as the surface.

The clear answer is supplied by the decision of the Kentucky Court of Appeals in Rowland, et al. v. Lilly's Heirs, 190 Ky. 757. The essential facts of that case have heretofore been recited. In reaching its decision that the owner of a fractional interest in land can not effect a complete severance of all the minerals, the Kentucky Court said:

> "Being an exception, it necessarily follows from the very nature of things that this grantor could not except out of the operation of her conveyance an interest to which she had no title."

In Kentucky, a grantee in an executed deed, as distinguished from an executory contract of sale, in holding land under claim of ownership, holds adversely as

to his grantor as well as to the world. Winlock v. Hardy, 14 Ky. (4 Littel) 272.

And, under the rule laid down in Big Sandy Co. v. Ramey, 162 Ky. 236, adverse possession of the surface of land from which part of the minerals have been severed, extends to all unsevered minerals.

Therefore, when the rules of Rowland v. Lilly's Heirs, Winlock v. Hardy, and Big Sandy Co. v. Ramey are followed and given their proper effect, it is clear that petitioner Maddix obtained title by adverse possession to the outstanding interests in the minerals in, as well as the surface of, the land in controversy.

And it is apparent from the face of the opinion of the lower court that its decision on this point is erroneous for the sole reason that the court failed to follow and apply these rules of law established by the cited decisions of the Kentucky Court of Appeals.

It necessarily follows from the foregoing that any and all attempted transfers of the land or any interests therein, after Maddix went into possession, in 1908, were champertous and void, for Maddix's possession was adverse both as to surface and minerals. Kentucky Statutes, Sec. 210. And, in fact, nothing could have passed by the deed of 1938 from Mary Huntsman Griffith to respondent for the reason that Maddix had already acquired title by adverse possession to all the outstanding interests in both surface and minerals. Kentucky Statutes, Section 2505.

But even upon other considerations, independent of the foregoing, the deed of 1938 which respondent secured after commencing his action, was void. The

lower court admits in its opinion that even if Maddix's possession of the surface of the land did not extend to the minerals prior to 1938, on the other hand, petitioner's entry into the minerals and removal of same in 1938 did amount to actual and adverse possession. But the court said that it was not adverse possession for the purposes of the Champerty Statute for the reason "that appellee (petitioner) was her (Mary Huntsman's) co-tenant in the minerals". (Rec. original appeal, p. 46; cross-appeal, p. 16). We have never been able to understand that statement. The court had just finished holding that Maddix had no interest whatever in the minerals. And, moreover, the court had also held that petitioner, instead of "holding the surface as trustee for her (Mary Huntsman) "had in fact been holding the surface adversely to her for 30 years and thereby obtained title to Mary Huntsman's interest in the surface. (Rec., original appeal, p. 42; cross-appeal, p. 12).

There is no law in Kentucky, or any other jurisdiction, that prevents a co-tenant from adversely possessing the whole estate. Greenhill v. Biggs, 85 Ky. 155. Nor is there any law which prevents a surface owner from acquiring adverse possession of minerals. Harkins v. Keith, 267 Ky. 353. Under the relationships noted, it is only necessary that the adverse nature of the possession be unequivocally brought to the attention of the other co-tenant or mineral owner, and this may require different acts from which would ordinarily be required where no trust relationship exists. But certainly it is not prohibited by law.

The petitioners were in adverse possession of these minerals when they commenced mining them under the claim that they owned them. Respondent's bill of com-

plaint had this for its very basis. And the deed of 1938, obtained by respondent after the bill of complaint was filed, was clearly champertous and void as held by the District Court. Ky. Statutes, Section 210.

The deed was also champertous and void because obtained by respondent while the suit was pending. The purchase of a litigious claim is champertous under the common law. And irrespective of any local rule, (although there is no rule in Kentucky to the contrary), this court is free to follow its own decisions on a matter of this nature. It peculiarly offects litigation in the Federal Courts. This court held in Orton v. Smith, 18 Howard 263, that the purchase of a title to land while a suit concerning it is pending will not be upheld or protected. This is in accord with the general law. Am. Jur., Champerty and Maintenance, Sec. 24.

But however this may be, as heretofore pointed out, it is seen that the deed of 1938 passed no title when the Kentucky law is followed on the first proposition argued. Petitioner, Maddix, had already obtained title by adverse possession to the outstanding interests in the minerals as well as the surface.

We submit it to be demonstrated beyond doubt, from the face of the opinion of the lower court, that it has declined to follow the law of Kentucky in deciding this case. Not only a statutory but also a constitutional right has thereby been denied petitioners. Erie R. Co. v. Tompkins, supra.

The law governing the title to minerals in Kentucky is important to residents of Kentucky and others who deal in those minerals. A large per cent of the wealth of Eastern Kentucky lies under the surface of its soil

in the form of fire clay, coal, oil, gas, etc. Much litigation arises constantly over this mineral wealth. It is therefore highly important that no erroneous precedent affecting these rights be left standing. The precedent established by the decision of the lower court in this case is so squarely opposed to the law of Kentucky on such vital and far reaching points that it will produce unestimable confusion in Kentucky mineral titles if not reversed, for the reason that the questions decided will recur again and again.

We therefore earnestly submit that the writ of certiorari prayed should be granted and the judgment of the lower court reversed.

Respectfully submitted,

H. R. WILHOIT,

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Counsel for Petitioners.